

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rate Adjustment Due to Extraordinary or
Exceptional Circumstances

Docket No. R2010-4R

PUBLIC REPRESENTATIVE REPLY COMMENTS ON REMAND CONCERNING THE
EXIGENT REQUEST OF THE UNITED STATES POSTAL SERVICE

(August 1, 2011)

I. INTRODUCTION

The Public Representative respectfully submits the following reply comments in response to the Commission's request for comments addressing a causation standard applicable to exigent rate adjustment requests submitted under 39 U.S.C.

§ 3622(d)(1)(E).¹

The Public Representative filed timely initial comments on July 25, 2011.² Initial comments also were filed by Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association, and Magazine Publishers of America, Inc. (ANM/APC/DMA/MPA); American Postal Workers Union, AFL-CIO (APWU); Greeting Card Association (GCA); Saturation Mailers Coalition and Valassis Direct Mail, Inc.

¹ Notice and Order Establishing Procedures on Remand, July 11, 2011 (Order No. 757).

² Public Representative Comments on Remand Concerning the Exigent Request of the United States Postal Service, July 25, 2011.

(SMC/VDM); Senator Susan M. Collins (Senator Collins); Time Warner Inc. (Time Warner); and the United States Postal Service (Postal Service).³

II. PUBLIC REPRESENTATIVE'S REPLY COMMENTS

A. Postal Service Comments

1. Interpretation of Court Findings

In reading the Postal Service's comments, the Public Representative found the Postal Service's novel interpretation of the court's actions exceedingly confusing, and was left with the impression that the Commission committed multiple errors in reaching its decision in Order No. 547. The Public Representative is concerned that others might also find these comments confusing, or believe the Commission committed multiple errors. In reality, the court assigns only one task to the Commission for the purpose of correcting a single procedural error.

The court remands the level of causation issue to the Commission because the Commission erred in believing that the plain meaning of the statute dictated a level of causation standard. The single task the court assigns to the Commission is to use its agency expertise when arriving at a standard based upon a permissible construction of the statute. It is not permissible for the court to prejudge any standard that the Commission may eventually put forth. The Commission may adopt any standard that is based upon a permissible construction of the statute. It even may adopt the strict nexus or offset test that the court appears to criticize.

³ Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc., July 25, 2011 (ANM/APC/DMA/MPA Comments); Initial Comments of American Postal Workers Union, AFL-CIO, July 26, 2011 (APWU Comments); Initial Comments of the Greeting Card Association, July 25, 2011, and Detailed Analysis, July 25, 2011 (GCA Comments); Initial Comments of the Saturation Mailers Coalition and Valassis Direct Mail, Inc., July 25, 2011 (SMC/VDM Comments); Letter dated July 25, 2011, from Senator Susan M. Collins (Senator Collins); Initial Comments of Time Warner Inc. in Response to Commission Order No. 757, July 25, 2011 (Time Warner Comments); and Initial Comments of the United States Postal Service, July 25, 2011 (Postal Service Comments).

2. Proposed Standard

The Postal Service contends that “the Commission should adopt a standard requiring that the size of an exigent increase be generally proportionate to the impact on the Postal Service of the extraordinary or exceptional circumstances.” Postal Service Comments at 1-2, 6. It argues that the “balancing called for by Section 3622 indicates that a pragmatic, flexible, non-mechanistic approach be adopted for applying the ‘due to’ standard. This will ensure that the exigency clause is able to be applied in a flexible manner that takes the characteristics of an individual case into account.” *Id.* at 12.

The Public Representative interprets the causation standard proffered by the Postal Service to imply that exigent requests should be examined on a case-by-case basis and judgment applied to determine whether or not the request is appropriate under the circumstances. This appears to be totally subjective and very well could lead to different results dependent upon the differing inclinations of the persons evaluating the exigent request. An objective standard upon which to evaluate an exigent request appears to be missing.

The Public Representative believes that Congress had a specific intent when enacting the exigent provisions of the PAEA. The intent was not subjective in nature, and should not be addressed using a subjective standard. Congress had in mind a purpose to address circumstances that were either extraordinary or exceptional, and nothing more.

The standard proffered by the Postal Service does appear to require a quantification of both the exigent increase and the impact on the Postal Service of the extraordinary or exceptional circumstances. This would be a logical step in evaluating whether or not the size of an exigent increase is generally proportional to the impact on the Postal Service of the extraordinary or exceptional circumstances. The Public Representative notes that the current record does not contain such an estimate. Based

on the existing record of this docket, the Postal Service's instant request will not meet the standard proposed by the Postal Service.

B. American Postal Workers Union, AFL-CIO Comments

APWU urges the Commission to adopt "a weak causation connection requiring only that the Postal Service's rate request be due in part to, or related to the exigent circumstances." APWU Comments at 5. In support of its position, APWU cites to the weak causation standard presented in *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir.1989). APWU contends that the burden of a strict causation standard is too high, stating that the Postal Service's "financial difficulties are too complicated." APWU Comments at 4. APWU further suggests that the Postal Service has clearly demonstrated that its liquidity crisis and rate request are related. Finally, APWU cautions against establishing a causation standard generally applicable to all exigent requests because the context and content of future exigent requests are unknown. *Id.* at 2.

The Public Representative's initial comments readily distinguished *Adams* from exigent requests and further demonstrate the problems with applying a weak standard to exigent requests.

The Public Representative's initial comments also discuss the problems with standards that allow for recovery in excess of what can be attributable to a specific exigent circumstance (APWU cites to the liquidity crisis) and explains that other approaches are available to the Postal Service to address these issues (statutory, legislative, and the Postal Service's multi-step plan).

The Public Representative further disagrees with APWU that the Postal Service's financial difficulties are too complicated. Concerning the Postal Service's exigent request, estimates of the financial effects of the exigent circumstance are obtainable using best business practices. The Postal Service's request made no effort at all to isolate the effects of the recession from other known factors affecting volume decline.

Finally, the causation standard is a narrow issue that is ripe for resolution now. A standard can be developed which is applicable to both the instant and future exigent requests.

C. Greeting Card Association Comments

GCA argues that the Commission “is free within broad limits to define the causal relationship which must exist between the exigent event and the proposed revenue increments.” GCA Comments at 7. GCA contends that the interpretation should not permit recovery of incremental revenue not causally related to the exigency. *Id.* GCA further states “[t]here should not be just a causal relationship between the exigency and the requested increment, but also a substantial *qualitative* equality between the financial damage resulting from the exigency and the incremental revenue asked for.” *Id.* [emphasis in original].

GCA also argues that the application of the causal relationship should extend to individual classes. GCA states “[o]ne appropriate inference is that by including ‘equitable’ as a standard, Congress signaled an intention that the Commission consider individually the revenue increments proposed for each mail class or category.” GCA Comments at 16. GCA concludes “[a] pattern of rate changes responsive (as the original submission is not) to the disparate causal relationships between the recession and the behavior of volumes and revenues, class by class, would be required, were any increase at all to be found appropriate.” *Id.* at 19.

The Public Representative does not agree with GCA’s statutory interpretation that the causal relationship should extend between the exigent circumstance and price adjustment proposals at the class or category level.⁴ There is no specific statutory provision requiring this relationship; it only can be inferred by GCA’s interpretation of

⁴ For example, the Public Representative would not support a requirement that states: If an exigent circumstance only affects First-Class Mail, then only First-Class Mail prices can be adjusted.

what is “equitable.” What is equitable is best left to be resolved on a case-by-case basis.

D. Saturation Mailers Coalition and Valassis Direct Mail, Inc. Comments

SMC/VDM “submits that the only reasonable and practicable interpretation that makes sense within the context of the PAEA is that the amounts sought by the Postal Service must be limited to that ‘due *solely* to’ the exigent circumstance.” SMC/VDM Comments at 3 [emphasis in original].

SMC/VDM, as did the Public Representative, believes that the court did not conclude the Commission’s interpretation of causation was impermissible, but rather the Commission erred in not proceeding passed a *Chevron*, step 1, analysis. *Id.* at 2. The court’s decision cannot be read as providing direction to the proper interpretation of “due to.” *Id.* The Commission is to apply its own judgment and expertise in resolving the ambiguity in statutory language. *Id.* at 3.

The Public Representative also agrees with SMC/VDM on the difficulties with applying a “due *in part* to” standard. *Id.* at 4-5 [emphasis in original].

E. Time Warner Inc. Comments

Time Warner provides an informative interpretation of the court’s decision that should be taken into consideration. Time Warner believes a causation standard should require: (1) “the causal relationship must be primary or predominant, although not necessarily exclusive,” and (2) “all of the rate adjustments, with only *de minimis* exceptions, must be due to the exigent circumstances.” Time Warner Comments at 26. Time Warner’s comments are generally consistent with the Public Representative’s position.

F. Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc.
Comments

ANM/APC/DMA/MPA believes that a strict standard of causation is appropriate, stating that “[t]he Postal Service must show that the extraordinary or exceptional circumstance was the primary or efficient cause of the need for an above-CPI rate increase.” ANM/APC/DMA/MPA Comments at 9.

ANM/APC/DMA/MPA also believes that the Commission should narrowly construe the issues on remand. It notes that the Commission has not reopened the evidentiary record, and believes there is no justification for doing so. *Id.* at 2, 19 fn. 4. In Order No. 547, the Commission did not find any causal relationship concerning the Postal Service’s exigent request, and should reaffirm this finding on remand. *Id.* at 3, 14.

The Public Representative interprets ANM/APC/DMA/MPA’s position as that the Commission’s decision on remand should be limited to the causation issue, and not expanded further to reconsider the Postal Service’s exigent request. The Public Representative agrees that the causation issue must be addressed first, before any reconsideration of the exigent request is permitted. After the causation issue is decided, the Commission can consider the appropriate procedural path on whether or not to reconsider the existing exigent request. Procedurally, the Public Representative believes that the least complicated path is for the Postal Service to file a new exigent request, if it chooses to do so, based on the outcome of the remand.

G. Senator Collins Comments

Senator Collins asks the Commission to “apply a strict standard of ensuring that the Postal Service’s proposed rate increases are quantitatively, demonstrably, and causally linked to the exigent circumstances.” Collins Comments at 2.

Senator Collins' comments are consistent with the position of the Public Representative.

The Public Representative presented a proposed framework for evaluating the causal relationship in his comments of August 17, 2010. The Commission should consider requiring this framework or a similar process in making future evaluations of a causal relationship.⁵ Note that the framework not only requires an estimate of the cost of addressing the exigent circumstance, it requires an explanation of how the additional revenue obtained will be used to address the specific exigent circumstance. This is necessary to prevent an exigent request from being used merely to generate additional revenue outside of the price cap system, versus being used to generate revenue to address a specific exigent circumstance.

⁵ Public Representative Comments in Response to the Exigent Request of the United States Postal Service, August 17, 2010 at 16-23.

III. CONCLUSION

The Public Representative respectfully submits the foregoing reply comments for the Commission's consideration.

Respectfully submitted,

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